

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DALLAS C. KILPATRIC)	
Claimant)	
VS.)	
)	
BONANZA, INC.)	Docket No. 253,097
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) appealed the July 1, 2003 Order for penalties entered by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on January 13, 2004.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared for claimant. Nathan D. Burghart of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board considered the July 1, 2003 motion hearing transcript together with the exhibits attached thereto and the pleadings and the other documents contained in the administrative file.

ISSUES

Due to respondent's failure to pay ordered permanent partial disability compensation, Judge Clark assessed the maximum penalty of \$100 per week for the

period beginning May 7, 2003, "until the payments are current."¹ Respondent contends Judge Clark erred because its obligation to pay the compensation was stayed by its appeal of the ALJ's Award.² Claimant argues that the ALJ's Award was replaced by a subsequent award on review and modification. And because the ALJ's Review and Modification Award was not appealed, those ordered benefits were not stayed.³ Although the ALJ's Order does not specify, it was apparently the Review and Modification Award order upon which penalties were based.⁴

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This is a claim for a January 11, 2000 accident. The following is a brief chronology and summary of the relevant pleadings and orders entered in this case:

- January 10, 2002 - Award entered by Administrative Law Judge John D. Clark for a 31.5 percent permanent partial general bodily disability.
- January 22, 2002 - Application for Review before the Workers' Compensation Appeals Board and Docketing Statement filed by respondent.
- July 16, 2002 - oral argument heard by the Board.
- November 15, 2002 - Application for Review and Modification filed by respondent.
- May 7, 2003 - Review and Modification Award entered by Administrative Law Judge John D. Clark finding effective July 1, 2002, claimant was engaging in work for wages equal to 90 percent or more of the average gross weekly wage claimant was earning at the time of the injury and, therefore, his permanent partial general disability compensation award should be modified from a work disability to his percentage of functional impairment, which had previously been found to be five percent.⁵

¹ Order (July 1, 2003).

² See K.S.A. 44-551 and K.S.A. 44-556(b); See also *Harrick v. Arabian Horse Express*, No. 183,004, 2002 WL 230952 (Kan. WCAB Jan. 31. 2002); *Aff'd*, Case No. 88,540, 58 P.3d 758 (Kan. App. Nov. 2002).

³ See K.S.A. 44-528; See also *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

⁴ See K.S.A. 44-512a(a).

⁵ See K.S.A. 44-510e(a).

- May 30, 2003 - Order entered by the Board modifying the January 10, 2002 Award to a 30 percent permanent partial general disability.
- June 24, 2003 - Motion for Penalties and Post-Award Attorney's Fees filed by claimant.
- July 1, 2003 - Notice of Appeal to the Kansas Court of Appeals filed by respondent appealing the May 30, 2003 Order entered by the Board.
- July 1, 2003 - Order for penalties entered by Administrative Law Judge John D. Clark.

The ALJ's original January 10, 2002 award order was timely appealed by respondent and that appeal is now pending before the Kansas Court of Appeals. Respondent's appeal of the ALJ's January 10, 2002 Award stayed payment of the ordered permanent partial disability compensation. Similarly, respondent's appeal of the Board's May 30, 2003 Order to the Kansas Court of Appeals stayed the payment of the past due compensation.⁶

However, the ALJ's Review and Modification Award entered May 7, 2003 was not appealed. Accordingly, that award became final and those ordered benefits were not stayed. But the Review and Modification Award did not order the payment of any additional weeks of temporary total disability or permanent partial disability compensation that were not previously awarded in the ALJ's January 10, 2002 Award, as modified by the Board's May 30, 2003 Order. In effect, what the ALJ's Review and Modification Award did was cut off claimant's permanent partial disability compensation as of July 1, 2002, the date he returned to work earning ninety percent of his pre-injury average weekly wage. Otherwise, the Review and Modification Award only repeated what had previously been awarded and what claimant was due for the weeks before July 1, 2002. Those were the same weeks of disability benefits that had been previously ordered and were stayed by the appeal of the Board's Order and the underlying original ALJ's Award. As the Review and Modification Award did not order any additional compensation, the ALJ's implicit finding that those benefits were not stayed was error.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge John D. Clark on July 1, 2003 should be reversed and penalties are denied.

IT IS SO ORDERED.

⁶ Respondent paid the permanent partial disability compensation for the period beginning August 15, 2002 pursuant to K.S.A. 44-551(b)(2)(B) and K.S.A. 44-556(b).

Dated this ____ day of January 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Stephen J. Jones, Attorney for Claimant
- Nathan D. Burghart, Attorney for Respondent and insurance carrier
- John D. Clark, Administrative Law Judge
- Anne Haught, Acting Workers Compensation Director